No. 3915

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

L. E. DOAN,
Appellant,

vs.

B. T. DYER,
Appellee.

BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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STATEMENT OF THE CASE.

This suit, originally filed by appellee in the Superior Court of the State of California, in and for the City and County of San Francisco, and later removed to the Southern Division of the United States District Court for the Northern District of California, Second Division, by appellant, defendant below, upon the ground of the diversity of citizenship relates to an alleged partnership between the parties.

It is alleged in the complaint that during the month of August, 1918, the parties entered into an oral agreement of partnership for the general purpose of acquiring and selling oil lands and leases of

oil lands and interests in such properties; that under the terms of said agreement the parties, and each of them, should and would give their attendance and devote their entire time and attention to the business thereof, and to the furtherance and advancement of the partnership business and affairs to their mutual benefit and advantage; that said plaintiff and said defendant should from time to time furnish to such copartnership

> "such sums of money as should be necessary to promote and carry on its business and purposes, and that they should divide the profits if any thereof between them, share and share alike";

that the parties should keep accounts and account to one another for all moneys received and paid out. It is further alleged in the complaint that as the result of said partnership the parties acquired and disposed of certain oil lands and leases and interests in corporations of the approximate value of $250,000.00; that the partnership had never been dissolved; that while plaintiff had at all times fully complied with all terms and conditions of the partnership agreement defendant had wrongfully applied certain moneys and properties of the partnership to his own use and had impeded and injured the business of the partnership and had devoted his time and attention to his personal business and affairs to the detriment of said partnership business; that the defendant had failed, neglected and refused to pay and deliver, assign and transfer the moneys, properties and interests to the partnership and plaintiff.

The prayer of the complaint is that the partnership be dissolved and defendant be required to account to plaintiff (Complaint, Tr. 1-8).

The answer denies that the parties at any time entered into or formed a partnership for the purposes specified in the complaint or for any other purpose at all, or that the parties at any time entered into an agreement of partnership, either oral or in writing, and in other respects generally traverses the complaint.

The trial Court held that the parties'

> "venture was a joint one at least * * *" and was "inclined to the opinion that it constituted a partnership as defined by the Civil Code of California",

holding further that the

> "relationship between the parties was dissolved March 22nd, 1920" (Tr. 14-16).

An interlocutory decree was entered in conformity with the Court's opinion, in which it was decreed that the parties "orally associated themselves together, entered into and formed a co-partnership" the latter part of August, 1918, which was dissolved on the 22nd day of March, 1920, and ordered that the proceedings be referred to Hon. H. M. Wright, as Special Master, to take and make an account (Tr. 16-20).

Thereafter evidence was introduced before the Special Master and an original and supplemental report entered on the accounting (Tr. 20-57, 57-61).

Thereupon each of the parties took exceptions to the Master's report (Tr. 61, 64). The exceptions were submitted to and argued before the trial Court and memorandum opinion was rendered and order for decree on the exceptions to the report of the Special Master was entered on the 2nd day of December, 1921 (Tr. 66-71).

An order was thereupon entered granting plaintiff's exceptions and overruling defendant's exceptions (Tr. 71). Final decree was entered defining the respective interests of the parties (Tr. 72-79).

This appeal relates both to the interlocutory and final decrees.

ERRORS UPON WHICH APPELLANT RELIES.

Briefly stated appellant's appeal is predicated upon the finding made in the interlocutory decree that a partnership at any time existed between the parties, and that if any such partnership did exist the Court erred in failing to find that such a partnership was dissolved the latter part of May, 1919;

That the Court erred in rendering the final decree in sustaining plaintiff's exceptions to the Master's report with regard to the second issue of 33,333 shares of the stock of Doan Oil Company;

The Court erred in rendering a final decree overruling defendant's exceptions to the Master's report, denying defendant interest on money which he had advanced as specified in the report.

SCOPE OF REVIEW.

It is our conception of the law that upon appeal in a case such as this the Appellate Court will review the record for the purpose of ascertaining whether the evidence sustains the interlocutory and final decrees, and also whether under the facts the conclusions of law are correct, and will examine the entire case upon its merits and direct final decree accordingly.

Waterloo Mining Co. v. Doe, 82 Fed. 45, 51;
Carson v. Combe, 86 Fed. 202, 210;
Dower v. Richards, 151 U. S. 658, 663;
Ward Baking Co. v. Webber Bros. 230 Fed. 142.

THERE ARE TWO MAIN QUESTIONS FOR DETERMINATION.

The case is naturally divided into two main questions:

Whether under the facts and the law the relation of the parties was that of partners;

Whether, in the event the parties are held to be partners, the final decree determining the respective rights and interests of the parties is correct.

The determination of the issues involves both questions of fact and law.

It is elementary that in the absence of a written agreement of partnership the party who alleges its existence must assume the burden of establishing the fact that a partnership existed by clear and convincing proof.

The issues are simple and would be easy of determination were it not for the fact that there is great conflict in the testimony given by the respective parties and it therefore becomes necessary in order to determine the precise facts to review the evidence at length and analyze this testimony in the light of the other evidence before the Court. An analysis of the evidence will also serve to develop the fact that during the month of May, 1919, there was a marked change in any relationship that may have theretofore existed between the parties. Prior to that time they had engaged in several independent ventures in Texas and Oklahoma but in May, 1919, Dyer (*) assumed the presidency of the North Texas Supply Company at Wichita Falls, Texas, and later in the year entered into the employ of the American Oil Engineering Company, during all of which time Doan, independently of Dyer, devoted his entire time and attention to developing properties which Messrs. Titus, Lucey and himself had acquired in Louisiana, in which Doan invested $100,000 of his own funds.

THERE WAS NO AGREEMENT OF PARTNERSHIP.

Relationship of the parties from August, 1918, to May 30th, 1919.

Dyer testified that after having made a preliminary trip through the Texas oil fields in the latter part of August, 1918, he described to Doan in San

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* For the sake of clarity and brevity we shall refer to the parties by their last names without, of course, intending any disrespect.

Francisco, in August, 1918, what he had seen in *Texas,* and stated

> "that the opportunities are so big that I am going back, and we ought to go back and get in the game, I am going back anyway".

According to the testimony of Dyer, Doan then told Dyer that he would go back with him as soon as certain legal matters had been cleared up and:

> "We will go back there and hit the ball, and * * * we will divide our profits. * * * You go ahead" (Tr. 109-110).

On cross-examination Dyer testified:

> "On my direct examination I gave the sum and substance of all conversations relating to a partnership arrangement, and I don't recall any other conversations or any other arrangements I have ever had with Doan with reference to any partnership. What I said upon direct examination is *all the arrangements that I ever had or ever made* with Doan at *any time* with reference to a partnership between us. I did not have any other arrangement or understanding with Doan except as I have testified. * * *The sum of all that was said by Doan at that time, in response to my suggestion that we go to *Texas,* was that I stated to Doan after I advised him what investigations I had made, 'I am going back anyway, Larry, and I want you to come back with me', and Doan's reply was, 'I will come back with you and follow you up and hit the ball and back you up, and we will divide the profits'. That was the sum of our many conversations" (Tr. 120). (Italics ours except where otherwise noted.)

Doan denied having made these statements and testified that he had no agreement whatever with

Dyer before he went to Texas and there was no understanding except that he was to go back to Texas (Tr. 179).

Leaving out of consideration for the purposes of argument the denial of this "partnership agreement" by Doan, and without stressing the point that the burden of proving a partnership by clear and convincing evidence rests upon Dyer, and reading Dyer's testimony as it stands in the record, in which he stated that his testimony upon direct examination

> "is all the arrangements that I ever had or ever made with Doan at *any time* with reference to a partnership between us",

it is impossible to escape the conclusion that any agreement or understanding related exclusively to operations in *Texas,* that Doan agreed to do no more than back Dyer up and divide such profits as might be yielded to Doan by operating in oil lands in that state, and there was no agreement of partnership.

THE "AGREEMENT" INTERPRETED IN THE LIGHT OF THE PARTIES' CONDUCT.

The subsequent conduct of the parties supports this contention and will, we believe, compel the ultimate conclusion that the parties never entered into an agreement of partnership, but that they subsequently, as was suggested by the trial Court, engaged in several independent joint ventures within the period presently under consideration, and that

these relations did not continue after the date Dyer became president of the North Texas Supply Company.

Dyer testified on cross-examination that no land purchased was ever carried in the name of Doan & Dyer or Dyer & Doan; they never had any account in the name of Doan & Dyer or Dyer & Doan; they never had any joint bank or other account nor common fund; never had any common books of account; that none of the profits which accrued from any transaction in which Dyer received a commission were ever placed in any joint account; never had any stationery upon which both the names Dyer & Doan appeared; but that when Dyer represented Doan it was by virtue of a power of attorney which Doan had given Dyer, and that when some of the leases were sold in the name of Doan "I was acting as his attorney in fact" (Tr. 121, 122-124).

According to the testimony of Dyer, Doan advanced all of the money which was invested except comparatively small sums which for convenience were at times temporarily advanced by Dyer (Tr. 122, 123, 124).

The relations between the parties and the respective interests in the transactions which were conducted from August, 1918, until the end of May, 1919, are detailed by Doan (Tr. 176-184), from which it appears that Doan had absolute and full say as to how and in what manner the different properties should be acquired and sold; that he ad-

vanced out of his personal account moneys which were paid for these properties; and that during this time he consummated several transactions in which Dyer did not participate in any of the commissions which Doan earned.

It is deemed unnecessary to encumber this brief with a resume of this testimony for the reason that even though reference only be had to the testimony of Dyer it clearly shows that these transactions were not carried on by the parties as partners or under any partnership arrangement but that Doan was the principal in each transaction, supplying the capital, dictating the terms of purchase and sale, fixing the price of purchase and sale, determining all questions of policy; and that Dyer was compensated for services rendered in these transactions by a division of the commissions or profits earned.

Dyer was virtually an agent or employee of Doan and was compensated by Doan for services which Dyer rendered by a portion of the commission or profits which Doan earned in the several independent Texas and Oklahoma transactions, but Dyer was in no sense a partner.

Between August, 1918, and May, 1919, several independent deals were made in Texas and Oklahoma by Doan which Dyer was in a measure instrumental in consummating, but always under the direction of Doan. The first transaction was consummated in November, 1918, Doan acquiring leases in Bosque County, Texas, aggregating 8000 or 10,000 acres. Doan paid the seller out of his own

funds 50 cents an acre. The leases were assigned directly to Doan. Doan told Dyer that after the leases were sold and Doan had his money back he would give Dyer one-half of the profit. The leases were subsequently sold at a profit in Doan's name, by Dyer under power of attorney which Doan had given Dyer, and the profits were divided (Tr. 179).

The next transaction related to the acquisition of leased acreage in Stevens County, Texas. Dyer wired Doan, who was in California, for his consent to purchase that property and Doan wired him to do so and advised Dyer that Doan was prepared to pay the purchase price. Dyer advanced $1250, and Doan repaid him one-half of this sum immediately upon his return to Fort Worth. This property was sold before the next payment became due and the profits were divided between the parties (Tr. 180).

The property which was next acquired was in Eastland County, Texas. The full purchase price was $15,600. Dyer advanced the initial payment of $500 and Doan paid the remainder of the purchase price, $15,100. Dyer's $500 was returned to him after the deal was closed. Mestre Olcott, witness for complainant, testified that the money received upon the sale of this property was deposited in the bank in Doan's favor (Tr. 99, 180). Doan did not deduct any of his expenses incurred in connection with this transaction (Tr. 191).

On May 5, 1919, a contract was made between Doan and W. J. Wallin (Plff. Ex. No. 45, Tr. 210)

to purchase a five acre tract known as the Burke-Burnett Tract. Dyer testified:

> "Doan wanted me to look at that piece while I was up there (Wichita Falls) and he wired me not to lose it unless I saw something better."

Dyer stated that the initial payment of $10,000 was paid with Doan's money and that Doan paid the balance of the $40,000. He testified as follows:

> "I considered I had a half interest in that $40,000 with Doan. I do not recall that Doan ever told me that I had a half interest in it" (Tr. 122).

This property was afterwards transferred to the Doan Oil Company and subsequently sold for $50.00 (Tr. 181-2). While Dyer testified that he had advised Doan against making the payment of the $30,000 balance due on the property this testimony is flatly contradicted by Doan and his son (Tr. 183, 289).

The testimony of Doan and his son is corroborated by that of Mr. Louis Titus, who testified that Dyer told him after the property had been purchased that it was a wonderful piece of property and he thought it very valuable (Tr. 202).

In the early part of May, 1919, Doan authorized Dyer to purchase one-half interest in property known as the Tillman County lease, which had been acquired by F. E. Couch. According to the testimony of Couch, Doan authorized Dyer to acquire one-half interest in this property for Doan and when he met Doan at Fort Worth later he told him

that if the title was all right he would pay the balance and when he came back to Fort Worth he (Couch) could give him his half. The property was subsequently sold at a profit and Doan was given a check for $5400, representing half the sale price, less expenses (Tr. 87, 88, 91). Dyer testified that the title to this property was taken in the name of T. B. Owens and all Dyer advanced was some lawyers' fees (Tr. 121).

These attorneys' fees amounted to $25 and were claimed by Dyer in his account, the account also showing that Dyer held in his possession $2092.50, representing the portion of the amount received from the sale of this property (Tr. 384-5).

The manner in which these transactions were negotiated indicates clearly that there was no partnership relationship existing between the parties. All money invested in each transaction was paid by Doan, except the temporary small initial payments which were made on two of the transactions by Dyer and which were returned to him. In the acquisition of the Burke-Burnett piece for instance Dyer advanced only $65 for attorneys' fees, while Doan paid $40,000. Dyer testified that he did not recall paying out any money on any of the properties other than as shown by Plff. Ex. 36, 37, 38 and 39 (Tr. 165).

The account rendered by Dyer shows that all the money he advanced at any time aggregated $2694.82, $1000 of which is represented by an expense account which he presented to the Doan Oil

Company and which was disallowed by the Doan Oil Company and by the Master; and one-half of the automobile account aggregating $1332.50, leaving but $362.32 which he had advanced in connection with any properties acquired by Doan, his total claim under his account aggregating $602.32 (Tr. 384-5); whereas the account rendered by Doan showed that from time to time he advanced $311,-665.50 (Tr. 339).

The Court's attention is directed to the testimony given by Doan (Tr. 176, 178, 179, 184, 217). The uncontradicted evidence supports and corroborates this testimony, which is to the effect that Doan was the "boss", dictated the terms of every transaction, advanced the money to acquire the properties, dictated the terms on which they should be sold, assuming the entire risk, and held title to the properties in his own name.

In other words each transaction was handled separately and distinct from the others. According to the testimony of Dyer in the deals on which a profit was earned Doan divided the profits with Dyer when the transaction was closed. But Doan at no time called upon Dyer to share any losses.

Had there been a partnership profits would, naturally, and in fact inevitably, have been applied to a partnership fund to be invested by the "partners" in subsequent transactions. In none of these transactions, and the same is true of any transaction subsequently held between the parties, was the title to property taken in the name of the firm

of Doan and Dyer or Dyer and Doan, or the name of any partnership. The uncontradicted evidence shows that the title to all the properties was vested in Doan. It was his money that paid for the properties, he assumed the entire risk and bore all the losses.

If either of the parties had any suspicion that they bore the relation of partners they would undoubtedly have taken the property in the firm name, the transaction would have been conducted in the name of the firm, and accounts would have been kept in the firm name and the partnership funds accumulated and applied in subsequent transactions as they occurred. As a matter of fact there was not at any time whatever any joint account, Dyer testifying that:

> "No profits which we made in any joint venture were paid into any joint account." (Tr. 124.)

Even though we indulge in the violent assumption that the testimony with reference to the agreement of "partnership" was as Dyer testified and leave out of consideration Doan's flat contradiction of Dyer's testimony and further, leave out of consideration the fact that the burden of proving a partnership by clear and convincing evidence rests upon Dyer, yet it must be held, in view of the manner in which the parties conducted business as hereinabove outlined, that at no time was there a partnership in any sense of the word. On the contrary it must be evident that either Dyer was an

employee of Doan receiving his compensation on the basis dictated by Doan or, on the other hand, and as was suggested by the Court in the original opinion (Tr. 14-16), they were joint adventurers in each of the separate and distinct transactions related in the evidence. This contention is supported and fortified by the fact that no question was made by Dyer to the several independent transactions which were conducted by Doan in his own name, special reference being made to the Wehr-Haywood Syndicate in which Doan invested $1000 (Tr. 185). Dyer also testified that he had independent dealings with W. L. Leland, in which he invested $2000 of his own money and in which Doan had no interest (Tr. 94). He also testified that he sold some leases for Jergins in Archer County, Texas, in March, 1919, and received a commission (Tr. 118-19).

Relationship of the parties from May 30, 1919, to March 22, 1920.

There was a marked change in the relationship of the parties from the time Doan began operations in the State of Louisiana.

By the interlocutory decree the parties have been constituted partners and the term of the partnership defined as continuing from August, 1918, until March 22, 1920, notwithstanding the fact that on the 30th of May, 1919, Dyer entered into agreements with Captain J. F. Lucey and Doan to become president and general manager of the North Texas

Supply Company, a corporation thereafter immediately formed, at a salary of $500 a month, and while acting in that capacity to devote his entire time and attention to conducting this business at Wichita Falls, forming at least two drilling companies and rig building companies; and that Dyer in August of that year made preliminary arrangements and in October or November entered into a final, independent contract with the American Oil Engineering Company to represent their interests in Texas and other states, at a salary of $1000 per month, subsequently increased to $1250 per month; and notwithstanding the admitted fact that Dyer did not invest a single dollar, nor devote an hour's time in furtherance of Doan's Louisiana interests.

If under facts such as are disclosed by the record in this case persons may successfully claim that they are a partner and entitled to the benefits accruing from such partnership, no one is safe in maintaining the most casual business relations without fear of jeopardizing their capital.

It is respectfully submitted that the interlocutory decree runs counter to the well established rule that a partnership can never be created by implication or operation of law apart from the express or implied intention and an agreement to constitute the relation.

We believe that the facts relating to Doan's Louisiana venture fully bear out these contentions. Doan testified that he went to Louisiana in April or May, 1919, where he purchased out of his own

funds 40 acres in Bull Bayou field from Clark & Grier, and that Dyer was in California at the time the purchase was made.

Mr. Louis Titus was the only party interested with Doan at the time this purchase was made although Captain Lucey, as it will subsequently appear, also became interested. Doan testified that some time during April or May he told Dyer he was going to operate in Louisiana in association with Mr. Titus and that the proposition in Louisiana would be on an entirely different basis from any deals they had had before and that Mr. Titus would be interested with him in everything in Louisiana (Tr. 185).

He told Dyer that on account of the business subsiding and excitement ending it was a dangerous thing to speculate in leases, evidently having in mind the disastrous Burke-Burnett purchase and that he would not venture further in that deep territory for fear he would be unable to sell the leases. At the time Mr. Titus and Doan went to Louisiana Dyer knew that they intended to make the trip but he was not invited to go. Titus and Doan spent several days in Louisiana and bought an additional piece of property for $110,000 upon which they made an initial payment of $10,000 with the joint funds of Doan and Titus. The balance of this money was paid by the Doan Oil Company, a corporation subsequently formed.

> "Dyer paid no part of the purchase price and had nothing to do with that transaction." (Tr. 186.)

Doan thereafter returned to Fort Worth, Texas, met Captain Lucey, Mr. Carr and his son. They made a trip to Wichita Falls and upon their return met Dyer in his room at the Fort Worth Club. The uncontradicted evidence shows that at this meeting the details of the supply business were explained to Dyer by Captain Lucey who enlarged upon the advantages which would accrue to Dyer by engaging in such a business, including a salary of $500 a month (Tr. 188). Doan advised Dyer to accept the proposition and later had a conversation with him at which Doan and Dyer alone were present. At this conversation Doan told Dyer that he had absolutely concluded that Dyer could not go to Louisiana, that this was an operation for Messrs. Titus, Lucey and himself.

The conversation between the parties is further detailed by them (Tr. 190, 191, 211-13), and is to the effect that if Dyer would fulfill his obligations under his contract with Captain Lucey, organize the California syndicate, organize two subsidiary drilling companies and rig building companies, which were a part of his agreement with Lucey, that Doan would carry Dyer for an interest in Louisiana. The arrangements made between Lucey and Dyer are corroborated by testimony of Mr. A. J. Carr who was present with them at the time the arrangements were made. He testified that the arrangement was that Dyer was to go to Fort Worth and not only manage the North Texas Supply Company but form contracting drilling companies and a rig building company, and that

Dyer might transact other business at Wichita Falls that did not interfere with the business of the North Texas Supply Company in that territory, and that Dyer

> "was to devote all of his time to those particular things that they agreed upon in that particular territory" (Tr. 277).

This testimony is further corroborated by the testimony of L. E. Doan, Jr., who was present at the time the arrangements were made between Lucey and Dyer (Tr. 285).

This evidence is further corroborated by Defendant's Exhibit "H" (Tr. 286) memorandum in Dyer's handwriting showing how the North Texas Supply Company was to be organized; that Dyer was to be president and subscribe for 10,000 shares of the stock.

There is marked conflict in the testimony as to the terms of the agreement made between Doan and Dyer at the time Dyer assumed the presidency of the North Texas Supply Company. But we believe that the evidence admits of no other conclusion than that Doan's testimony is correct. Dyer testified that Doan went to Louisiana the latter part of April, 1918, and when he returned advised him that he had made a deal on the Giffin well and also a 40-acre tract in Bull Bayou; that Doan told him that they would make some money out of it; that Dyer suggested selling it and Doan said:

> "No, Louis Titus is coming out shortly, and we had better wait until he gets there and see what he thinks about it."

Dyer further testified that Doan told him when the Doan Oil Company was organized and that after the formation of this company Doan said to him in the Forth Worth Club:

> "We have arranged to make a $300,000 pool, Mr. Titus has agreed to take half of it, Captain Lucey a sixth of it, and you and I a sixth apiece" (Tr. 116-17).

On cross-examination Dyer testified:

> *"I had nothing to do with that transaction. I knew nothing of it except what Doan told me at that time * * *. What Doan told me about the Louisiana property is practically all I know"* (Tr. 122-23).

Doan's denial of Dyer's testimony about the formation of the $300,000 pool and permitting Dyer to have a one-sixth interest in it (Tr. 274) is completely corroborated by exhibits introduced by counsel for appellee and by the testimony of Mr. Louis Titus. Complainant's Exhibit No. 7 (Tr. 130, et seq.) is a letter from Doan written at Shreveport, Louisiana, and addressed to Dyer under date of October 12, 1919, wherein Doan stated:

> "While there is a big boom on here I have not seen any thing that I could recommend to *your* crowd—that we cannot handle ourselves—and as I said before *I cannot afford to mix up with you on any outside deals in Louisiana."*

Both Mr. Titus and Mr. Doan testified that during the early part of May, 1919, after Titus and Doan had made their first trip to Louisiana, Dyer, Titus and Doan had spent three days traveling about Texas, looking at various oil fields, and that

they discussed various oil properties in Texas but that there was no conversation relative to the Louisiana properties (Tr. pp. 202, 186).

If the fact had been that Dyer was at all interested in Doan's and Titus' Louisiana venture, it seems strange that during the three days' conversation they did not mention anything concerning this territory, especially when consideration is given to the fact that in order to sustain the theory of appellee's counsel two new partners, Titus and Lucey, must have been admitted to the "partnership" without the knowledge, however, of the two partners.

Doan's refusal to permit Dyer to have anything to do with Doan's Louisiana venture is further corroborated by the testimony of Mr. Titus who unequivocally denied Dyer's evidence wherein he testified that Titus had said to Dyer: "Why are you not down in Texas?" or "Doan needs you," or "I am going down there and I am going to have Doan send for you at once because you should both be there together" (Tr. 204). But on the contrary Mr. Titus testified that during July, 1919,

> "Dyer stepped into my office, and I said to him, 'What are you doing here, I thought you were in Texas?' He replied that he had some affairs to attend to, and he had come up to California. I said, 'Are you going to stay here long, and when are you going back to Texas?' And he replied, 'I do not want to go back to Texas; I want to go to Louisiana, but Larry won't let me go; he wants me to stay in Texas'" (Tr. 202-203).

To say the least it is strange that if the parties bore the relation of partners in July and August, 1919, that one of the "partners" would rest content while his "partner" told him he could not visit the scene of the partnership's activities.

The evidence shows without conflict that from the time Dyer agreed with Messrs. Lucey and Doan to undertake the management of the business of the North Texas Supply Company Doan exclusively devoted his entire time and attention to the affairs of the Doan Oil Company in which Messrs. Titus, Lucey and Doan were jointly interested, and that Dyer had nothing whatever to do with these operations.

Reference has already been made to the evidence concerning the acquisition by Doan of properties in Louisiana fields which were paid for by the joint funds of Titus, Lucey and himself.

For convenience in acquiring, holding and developing their Louisiana properties Messrs. Titus, Lucey and Doan on June 30, 1919, formed a corporation known as the Doan Oil Company, with an authorized capital stock of $500,000, divided into 500,000 shares, of the par value of $1.00 each, the original incorporators being Messrs. Titus, Lucey, Raymond, Doan and Thigpen (Tr. 169). Subscriptions were made and shares of the corporation issued as follows: Louis Titus, 150,000 shares; J. F. Lucey, 50,000 shares; L. E. Doan, 98,000; S. S. Raymond, 1000 shares; and J. A. Thigpen, 1000 shares (Tr. 171). The shares issued to Thigpen and

Raymond were for the purpose of qualifying these parties as directors. Their stock was subsequently returned to Doan. Doan testified that he paid $93,000 cash for 93,000 shares and made up the balance by applying to this account the $7000 salary which had been voted him by the directors, and which he had received at the rate of $1000 a month (Tr. 343). There was no promotion stock but the stock was issued to Messrs. Louis Titus and J. F. Lucey and L. E. Doan in proportion to the amount of money which they invested (Tr. 345).

It conclusively appears from the evidence that Dyer did not invest a single cent in Doan's Louisiana venture, but that the capital employed in acquiring and developing these properties was supplied by Messrs. Titus, Lucey and Doan. *Dyer testified:*

> *"I never invested one cent individually in any of these projects of Doan's."*

Dyer further testified that he even did not know how much money Doan had invested in Louisiana except that Doan told him that he had invested $100,000 (Tr. 126-7).

It further appears conclusively that Dyer had nothing whatever to do with the acquisition, management or development of the Louisiana properties and that Doan expressly forbid him to have anything to do with the Louisiana properties (Tr. 187, 203).

THE CORRESPONDENCE PASSING BETWEEN THE PARTIES SHOWS THERE WAS NO AGREEMENT OF PARTNERSHIP AND THAT THEY WERE EACH ENGAGED IN INDEPENDENT VENTURES.

The several letters addressed by the parties to one another during the time Doan was engaged in developing the Louisiana properties in which Messrs. Titus, Lucey and himself had invested their independent capital, during which time Dyer was in the employ of both the North Texas Supply Company and the American Oil Engineering Company, conclusively show that the parties were not partners but that on the other hand they were each engaged in independent ventures.

In analyzing these letters attention must be given to the dates at which and the points from and to which they were addressed.

Plaintiff's Exhibit No. 7 (Tr. 130) is a letter addressed by Doan to Dyer from Shreveport, Louisiana, under date of October 12, 1919. In this letter Doan says:

> "While there is a big boom on here I have not seen anything that I could recommend to *your* crowd. That we cannot handle ourselves —and as I said before *I cannot afford to mix up with you on any outside deals in Louisiana.*"

He goes on to speak about the Lousiana operations and where Doan employs the word "we" it is apparent he is referring to Messrs. Titus and Lucey who were at that time his associates. This is emphasized by the fact that in the latter portion of the

letter Doan begins: *"Now in regard to yourself."* Doan gives Dyer some advice with reference to remaining at Wichita Falls and not making a trip to California every 60 days and adds:

> "If *you* will get down to brass tacks—and put *your* head to work *you* will make a killing. There are plenty of good opportunities—just as good as here. Just forget about this thing over here. I think I am capable of handling it and there is no room at present for two of us."

Counsel for appellee in arguing the case before the trial Court placed great dependence upon other letters addressed by Doan to Dyer during the time Doan was engaged in his Louisiana operations. He claimed that these letters supported his contention that a partnership existed between the parties during this time but an analysis of these letters will bear out the testimony of Dyer himself that he did not remember any conversation as to whether Doan intended to carry him for a particular interest (Tr. 129).

In a letter addressed by Doan to Dyer dated June 23, 1919, it clearly appears that Doan was endeavoring to induce Dyer to fulfill the agreement which he had made with Captain Lucey. He speaks about subscription to stock of the North Texas Supply Company which was made by each of the parties independently at the time this corporation was formed; and told Dyer that Captain Lucey

> "would like *you,* however, to subscribe for 10,000 additional—and if *you* can borrow the money I would advise *you* to do it. I will pay

> *mine* whenever *you* require it. When the 50% is paid in you will be able to make a statement to banks, which will give *you* borrowing capacity. Cap is very enthusiastic about *your* company and has given positive orders to take care of your wants" (Tr. 135).

Complainant's Exhibit No. 9 (Tr. 136) relates to a transaction consummated prior to the time Doan began his Louisiana operations. Complainant's Exhibit No. 10 (Tr. 137) addressed to Dyer prior to the time the North Texas Supply Company was formed and Doan began his Louisiana operations. In this letter Doan advised Dyer of opportunities which he might take advantage of in Texas. No suggestion of any joint interest.

Plaintiff's Exhibit No. 11 (Tr. 138-9) relates in the main to transactions which were consummated prior to the time Doan began his Louisiana venture.

Counsel for appellee stresses the "our" and "we" that appear in this letter as these terms are employed by Doan but when consideration is given to the fact that, according to the testimony, Doan had agreed to carry Dyer for an undefined interest in the event Dyer would successfully manage the North Texas Supply Company's business; and that the parties at the time this and other letters were written were upon the most intimate and friendly terms; and also to the fact that the "we" and "our" in practically all of the letters refer to the interests which were represented by Titus, Lucey and Doan, it is apparent that these words as employed by Doan relate to the interests of Titus, Lucey and him-

self. The same observations may be made with reference to Complainant's Exhibits Nos. 12 and 13. It also clearly appears from complainant's Exhibit No. 12 that the parties were acting entirely independent of one another and it may be observed that in these letters Doan constantly refers to Dyer's stock holdings in the North Texas Supply Company as "*your* stock" and states:

> "*You* can easily borrow money on this stock and I think *you* had better do it." "It will look better and *you* are taking no chances" (Tr. 141, 143).

In so far as the drilling operations were concerned Doan stated:

> "*My* second rig will be here by the 1st of October, and *I* will have two of our own going —a little later I could probably use *your* rig but *you* will have no trouble in getting a contract. The only trouble *you* will have will be in getting casing" (Tr. 144).

It also appears throughout these letters that Doan was endeavoring to put Dyer in possession of all possible information as to developments in order that Dyer might in turn keep his "California crowd" advised. This particularly appears from Complainant's Exhibit No. 14 (Tr. 145), letter addressed to Dyer by Doan from Shreveport, February 15, 1919, wherein it is said:

> "It might be a good opportunity for *your* California bunch and *I* will probably take some for the Doan Oil Company."

By reading the next to the last paragraph of the letter it will be seen that when he is speaking of "our" and "we" he certainly is referring to Messrs. Titus and Lucey and his Louisiana associates. He speaks of "our" well in Bull Bayou and said "we", evidently referring to the same persons to whom he referred by "our",

> "are having just as much trouble here hunting freight as *you* are in Wichita."

The same observations may be made with respect to complainant's Exhibit No. 16, letter addressed by Doan to Dyer, from Shreveport, October 14, 1919 (Tr. 148), where he speaks about the North Texas Supply Company voting stock to Dyer: "*You* can easily borrow" money to take up your subscription. The Court's attention is directed to Complainant's Exhibit No. 17, being a letter addressed by Doan to Dyer from Shreveport, Louisiana, under date of November 7, 1919, and the manner in which the words "our" and "we" are employed. There can be no question as far as this letter is concerned that the words "we" and "our" used in this letter refer to Mr. Titus and Mr. Doan (Tr. 150-51).

The points from which these letters were addressed and the points to which they were addressed bear out the statement that Doan was devoting practically his entire time to the development of the Louisiana properties, whereas Dyer was seldom at Wichita Falls but upon some occasions was in

Fort Worth and the remainder of the time in California, New York and other eastern points.

It may be noted in passing that Complainant's Exhibit No. 18 (Tr. 152), letter addressed from Shreveport by Doan to Dyer, January 8, 1920, relates to the "Santa Maria Syndicate", which was formed long prior to the time Doan began his Louisiana operations. The Court's attention is directed to the fact that many of the letters and telegrams offered as complainant's exhibits have no bearing upon the case for the reason that they bear date prior to the time of the beginning of the alleged partnership, or in the present connection relate to a time prior to the time the understanding was made between Doan and Dyer in May, 1919. As an instance we refer to Complainant's Exhibit No. 19 (Tr. 153). Complainant's Exhibit No. 20 has no significance in relation to the case except to show that in July, 1919, Dyer was in San Francisco instead of Wichita Falls. Same is true of Complainant's Exhibit No. 21. Complainant's Exhibit No. 22 (Tr. 154) relates to a meeting with Carr who was in charge of the activities of the Lucey Manufacturing Company and relates to business between that company and the North Texas Supply Company.

Complainant's Exhibits 23, 24, 25 and 26 (Tr. 155-6) also relate to the same subject matter.

Complainant's Exhibits 27, 28, 29, 30, 31 (Tr. 157-8) have no bearing upon the case except to show that on November 8th Dyer was in Chicago, No-

vember 11th in New York, November 25th and 27th in Los Angeles.

Complainant's Exhibit No. 33 (Tr. 159) telegram addressed by Doan from Shreveport, Louisiana, December 19, 1919, to Dyer, Pennsylvania Hotel, New York, is important in showing that Dyer was again absent from Wichita Falls and particularly that there was no partnership fund and that the interests of the parties were measured by their own independent holdings. In this wire Doan asks Dyer to send him $6000 which Doan advanced on behalf of Dyer on account of the Santa Maria well. If there had been a partnership between the parties this account of course, and the indebtedness of Dyer to the partnership, would not have appeared as a personal obligation from Dyer to Doan.

Complainant's Exhibit No. 47 relates to a period of time prior to the time Doan began his Louisiana operations and likewise Complainant's Exhibits Nos. 51, 52, 53, 54 and 55, telegrams from Doan to Dyer, all were transmitted prior to this time and related to Texas deals which had previously been made.

Complainant's Exhibit No. 58, telegram in which Doan advised Dyer that everything in the fields looks encouraging. Complainant's Exhibits Nos. 59, 60, 61, 62, 63, 65, 66, 71, 72 and 73 related to the business of the North Texas Supply Company and general advice about the Louisiana properties. It is natural that Doan should advise Dyer of these mat-

ters because he had agreed to carry Dyer for an interest in the Louisiana purchase in the event Dyer successfully managed the North Texas Supply Company, Doan being indirectly interested in the North Texas Supply Company, and his son also having an interest in that company.

Complainant's Exhibit 69 relates principally to negotiations which were being carried on by Dyer relative to the properties which Doan had acquired prior to the time he became interested in Louisiana. Complainant's Exhibit No. 70 is an invitation for Dyer to visit the fields, advising the general condition of the Louisiana property. No. 75 is a letter directed by Doan to Dyer under date of February 10, 1919, prior to the time he became interested in the Louisiana properties (Tr. 239).

Letter addressed to Doan to Dyer under date of September 1, 1919, Complainant's Exhibit No. 76 (Tr. 241) advises Dyer of the general situation in Louisiana and the same is true of Complainant's Exhibits No. 77 and No. 78, it being natural for Doan to keep Dyer advised as to progress in the Louisiana fields as Doan had promised to carry Dyer for a contingent interest in that project.

Complainant's Exhibit No. 79 (Tr. 247), letter addressed by Doan to Dyer under date of October 25, related to the business of the North Texas Supply Company and refers to a proposed sale to the American Oil Engineering Company, which Dyer had suggested. In this particular Doan testified that he did not know at this time that Dyer had

accepted employment with the American Oil Engineering Company.

Complainant's Exhibit 80 (Tr. 248) speaks about Titus and Doan deciding what they were going to do with reference to the Louisiana properties. Appellee's counsel endeavors to count Dyer "in" on the "we" appearing in this letter but it is apparent that "we" refers to Titus and Doan.

In none of these letters or telegrams is the word "partner" or "partnership" employed, nor is there any reference to any joint interest, joint account, joint assets, anything relating to a division of profits or the sharing of losses, nor one word or syllable with reference to defining the parties' respective interests as partners, nor does Doan in any of the letters or telegrams addressed to Dyer even go so far as to ask Dyer's advice. There is no suggestion that he at any time asked Dyer's consent. The letters are all extremely friendly in tone, acquainting Dyer very generally with the progress of Doan's operations such as one friend who had the interest of another at heart might address to another.

Doan's friendship for Dyer is evidenced by the fact that he had loaned money repeatedly without security, at times as much as $10,000 or $12,000, and assisted him in many ways for several years, even going so far as to establish credit for Dyer at the Anglo Bank in San Francisco and Central National Bank in Oakland (Tr. 263).

Throughout the testimony of Doan it is shown that he repeatedly undertook to give Dyer advice which would make to the interest of Dyer, and his acts show that he did everything possible within his power to enable Dyer to make a success.

UNTIL THE FILING OF THIS SUIT DYER NEVER CLAIMED THAT ANY PARTNERSHIP RELATIONSHIP EXISTED BETWEEN DOAN AND HIMSELF, BUT ACCORDING TO HIS OWN TESTIMONY ONLY CLAIMED AN INDEPENDENT PERSONAL INTEREST IN ONE-SIXTH OF THE STOCK OF THE DOAN OIL COMPANY.

While Dyer testified that before Doan began operating in Louisiana Doan told him:

> "We have arranged to make a $300,000 pool. Mr. Titus has agreed to take half of it, Captain Lucey a sixth of it, and you and I a sixth apiece" (Tr. 117),

this conversation was denied by Doan (Tr. 274). However, taking Dyer's testimony at its face value for the purpose of the argument, and assuming that this was the agreement between Doan and Dyer, it cannot be held that Dyer and Doan were interested in Louisiana operations as partners. According to the last quoted testimony Doan and Dyer were to take one-sixth apiece. If Dyer had any interest in the Doan Oil Company or in the $300,000 pool which he testified Doan told him was to be formed, it was as an individual and not as a partner.

Dyer testified that he had never invested one cent individually in any of these projects of *Doan's* (Tr. 126). Doan testified positively that he had agreed

to carry Dyer for an undefined interest in the event Dyer kept his agreement with Captain Lucey and himself and went to Wichita Falls, remained there and successfully conducted the business of the North Texas Supply Company, and formed the subsidiary companies (Tr. *190*). This positive and unqualified statement is met by the equivocal statement made by Dyer in response to question asked by his counsel on his redirect examination:

> "As to any conversation with Doan about his carrying my interest in the Doan Oil Company for a percentage, I don't remember of holding such conversation with him on that particular point. I talked with him so many times about it, but I don't remember of a conversation on that point of whether he would carry me for any particular interest. I told him I would have to give Fleishhacker a quarter of it if I got the money from him. Doan said he did not want them to share one bit of it" (Tr. 129-30).

According to this testimony Dyer was not proposing to raise one-half or any part of the amount that had been invested by Doan in the Louisiana operations and pay it into a partnership fund and hold the properties, but he was proposing, according to his own testimony, to borrow this money from Mr. Fleishhacker and give him one-fourth of this for the accommodation of the loan. This is a strange transaction as between "partners". Dyer's testimony upon cross-examination with respect to the Oklahoma deal, which was consummated prior to the time Doan began operating in Louisiana, shows

conclusively that Dyer did not claim an interest in the Doan Oil Company as a partner with Doan or otherwise. According to the transcript Dyer stated:

> "I received a check representing one-half of the sale price of the last parcel of the Oklahoma deal; I think it was $2090. I have not paid any portion of that money to Doan. I kept the last check and wrote him a letter that I had received this check and that he had not stated definitely whether the Oklahoma deal was our personal deal, or whether it had gone into the Doan Oil Company, and I was holding that subject to *our* settlement" (Tr. 164-5).

What can Dyer possibly have meant by saying that he was holding this money which represented one-half of the sale price of the last piece of the Oklahoma deal, "subject to our settlement". According to the arguments of counsel for appellee whenever the word "our" is used in any sense whatsoever it relates to Dyer and Doan. Perhaps the same argument may be employed in this connection.

There is not one syllable of testimony to the effect that Dyer at any time offered to pay any money to Doan on behalf of any "partnership" in connection with the Louisiana properties, but Dyer consistently testified that he was entitled to his one-sixth interest. In response to questions asked him by his counsel Dyer testified:

> "I have never received the one-sixth interest *in the Doan Oil Company.* I demanded it many times. The final demand was in March, 1920, when I went to Shreveport" (Tr. 119).

This claim to an undivided one-sixth interest in the Doan Oil Company was insisted upon by Dyer up until the date the trial Court held the "partnership" was dissolved.

Doan testified that on January 21, 1920, Dyer first told him that he had become associated with the American Oil Engineering Company. This conversation was at Fort Worth and Dyer stated to Doan that he wanted to know what his interests were in the Louisiana operations, that he wanted them settled. Doan told Dyer that he had violated his contract with the North Texas Supply Company; that he had not organized his California oil company; had not subscribed to his stock in the North Texas Supply Company; had not earned his bonus stock; and that Dyer was not entitled to anything. Dyer replied:

> "I can raise the money to take my interest in the Doan Oil Company. I have always been ready to do it."

Doan replied that he had not been ready to do so and could not do it, and that he had never offered to do it. At that time Doan told Dyer that he was obliged to borrow some money and that if Dyer would pay him what he had advanced Dyer in California, and if Dyer would purchase his North Texas Supply Company stock and pay Doan $1 a share for the Doan Oil Company stock, which was the price Doan paid for it; that he would give Dyer 50,000 shares of stock in the Doan Oil Company. Dyer agreed to do so and at that time wrote out a

check in favor of Doan for $3000, representing one-half the amount due upon the advance made by Doan in California, and agreed to send $3000 the following day. He promised that he would purchase the North Texas Supply Company stock (Tr. 191-3).

Letter written by Dyer from Fort Worth, Texas, addressed to Doan at Shreveport, La., under date of January 21, 1920, upon the stationery of the American Oil Engineering Company, Defendant's Exhibit "C" (Tr. 195), corroborates this proposed arrangement between the parties and shows conclusively that Dyer did not fulfill his part of the agreement. In this letter Dyer stated:

> "I am going to hold off the getting of the $50,000 until the last minute after you have had your meeting with Mr. Titus and decided on your policy. I will not do this to inconvenience you but for the purpose of being guided in getting my money. It will of course be necessary for me to give up a small piece of it in order to get this money but should you decide on a sale policy, either of land outright or stock that would reimburse present holders, I naturally would want to take advantage of that and not give up any interest other than is necessary. This feature dawned on me after you left last night and I wanted to explain it to you for your approval" (Tr. 195).

Under date of January 23rd Doan addressed a letter to Dyer, acknowledging the receipt of Dyer's letter of the 21st, and stating:

> "If you are unable to arrange for your money by the first of February we will have to change

> our plans somewhat because—I will have to raise some money at that time and I am depending on you. Let me know at once so I can make my arrangements accordingly. * * * If you have to give up one-quarter to raise your money I will do it for you on the same basis. Let me know by return mail what you want to do about it" (Defendant's Exhibit "D", Tr. 196-7).

On January 26th Dyer made reply to Doan's letter upon letterhead of the American Oil Engineering Company, in which he stated:

> "I have your letter of the 23d and I explained to you when you were here, it was agreed that I could obtain this money by giving the one-fourth interest mentioned. You ask me to write by return mail and state that you would do this on the same basis. If this is agreeable I would much prefer to handle the matter together with you on this basis as it would eliminate having any outsiders or any complications. If this is agreeable to you, please drop me a line and I will go no further to obtain this money on the outside. I want this absolutely agreeable to you either way and if you prefer to have me get the money advise me and I will get it at once" (Defendant's Exhibit "E", Tr. 197-8).

On February 9th Dyer again addressed Doan on letterhead of American Oil Engineering Company, stating:

> "I have not had a letter from you in answer to my last letter asking if it was agreeable as you had mentioned on the carrying of *my* Doan Oil Company interest. When you get time I would like to know how things are going with you" (Defendant's Exhibit "F", Tr. 199).

These letters confirm the contention hereinbefore made that at no time following the conferences in May, during which Dyer agreed to confine his activities to the management of the North Texas Supply Company, form a subsidiary company at Wichita Falls, did Dyer ever offer to contribute any sum at all to any partnership fund, but that from the beginning he was consistent in his statements concerning the original agreement that he was to receive and hold an undivided one-sixth interest in the Doan Oil Company, not an interest in any partnership. The uncontradicted evidence shows that Dyer in no way and at no time participated at all in the acquisition or development of the Louisiana properties and that according to the testimony of Doan, corroborated by Mr. Titus, Doan would not even permit Dyer to go to Louisiana.

The testimony of the appellee proves that no partnership existed at any time. In the absence of a community of capital, or property, and in view of the fact that Dyer had no control of the business and never undertook to determine a question of policy or the terms upon which any property should be acquired or developed, and with no attempt at any time by either of the parties to bind the other, there being no joint fund or partnership account, no obligation resting upon Dyer to pay any part of the purchase price of any of the properties; no joint ownership of partnership funds or joint right of control, it cannot be held the intention of the parties was to create a partner-

ship. This is especially true when consideration is given to the fact that Dyer, according to his own testimony, never contributed a cent to the acquisition or development of Doan's Louisiana properties, and never devoted an hour's time to them, but spent his time traveling about the country, neglecting his duties as president and manager of the North Texas Supply Company; entering into a separate contract of employment with the American Oil Engineering Company, and, according to his own testimony, became "one of their family". The uncontradicted evidence shows that during all of this time Doan devoted his entire time and attention in acquiring and developing his Louisiana properties, paid $100,000 for the property and work done thereon, and assumed the entire risk of any loss.

It must be held that all the essential elements of a partnership are lacking in the agreement, express or implied, between Doan and Dyer. There was no joint fund. Dyer contributed no money to the "partnership". The only thing he had to say about financing was to offer to pay Doan in January, 1921, $50,000 to acquire one-sixth interest in the Doan Oil Company. He testified that in order to obtain this money he would be obliged to give up one quarter of it to Mr. Herbert Fleishhacker. He had no say whatsoever in the conduct of the business and Doan would not consent to his going to Louisiana. There was nothing to show that the parties had authority to bind one

another or ever undertook to bind one another. There never was any agreement on behalf of Dyer to share in any of the losses. He did not devote a single hour of his time to the business of the partnership, although he alleges in his complaint that the parties were to devote their entire time and attention to the business.

The test to be applied in determining whether a partnership existed between the parties is to determine whether, in the event Doan's Louisiana venture had been a failure, Doan could have enforced a claim against Dyer for the return of one-half of the $100,000 which Doan advanced or one-half of any loss which Doan might have sustained. There is nothing in the evidence to warrant a finding that Doan could have recovered in such event.

A partnership relating to the Louisiana operations can not be proven unless Messrs. Lucey and Titus are included as members of the partnership.

Dyer testified that after Titus, Lucey and Doan returned to Forth Worth from Louisiana Doan said:

> "We have aranged to make a $300,000 pool. Mr. Titus has agreed to take half of it, Captain Lucey a sixth of it, and you and I a sixth apiece" (Tr. 117).

This testimony is denied by Doan (Tr. 274). This testimony of Dyer embraces all the evidence relating to any agreement relative to a partnership concerning the Louisiana properties. According to the testimony of Dyer the parties had been operating as "partners" in Texas and Oklahoma

under the agreement that Dyer testified was made between Doan and himself in San Francisco. If Dyer acquired an interest in this $300,000 pool Messrs. Lucey, Titus, Doan and Dyer virtually formed a partnership. Two new members were admitted into the "firm". There is no evidence that either Mr. Titus or Captain Lucey agreed to Dyer's becoming a partner or that they had any knowledge that he was to have a one-sixth interest in the Louisiana properties. In fact the testimony of Doan (Tr. 186-190) Doan, Jr., (Tr. 283-286), Carr (Tr. 275-277), and Dyer himself (Tr. 298,9) negatives any such assumption. The fact that Messrs. Titus, Dyer and Doan made a trip through the Texas fields lasting for three or four days, and that there was no conversation on the entire trip relative to Louisiana, is conclusive on this point (Tr. 202). It seems unnecessary to cite authorities in support of the contention that in the absence of an agreement on the part of both Messrs. Titus and Lucey they did not become a partner of Dyer's because the Civil Code of the State of California provides, Section 2397, that

> "Partnership can be formed only by the consent of all the parties thereto and therefore no new partner can be admitted into a partnership without the consent of every existing member thereof."

The appellee has never made the claim that Messrs. Titus and Lucey were partners with himself and Doan in the Louisiana venture but if there was a partnership during this time it must be held under

the testimony of Dyer himself that the members of the partnership were Titus, Lucey, Dyer and Doan. The evidence does not warrant the finding of any such partnership having existed.

The evidence of appellee's witnesses is not sufficient to prove a partnership.

Appellee has undertaken to prove that there was a partnership by introducing testimony of several witnesses to the effect that Doan made admissions that Dyer and himself were partners. Mr. F. L. Keller, witness for complainant, testified that some time *after January, 1920,* he met Doan with Mr. Frank Berry and Doan said that Dyer was with him in the oil business and he was going to make him a lot of money (Tr. 83).

Mr. H. F. Berry testified that he had a conversation with Doan between *January 20 and 25, 1920,* and that Doan said Dyer was his partner (Tr. 82). The testimony shows that on January 21, 1920, Doan and Dyer agreed that if Dyer would pay to Doan the $6000 which Doan advanced to Dyer in California; take his North Texas Supply Company stock and pay Doan $1 a share, that Doan would transfer 50,000 shares of Doan Oil Company stock to Dyer (Tr. 193-4). Defendant's Exhibit "C", letter Dyer to Doan, January 21, 1920 (Tr. 195); Defendant's Exhibit "E", letter Dyer to Doan, January 26, 1920 (Tr. 197); Defendant's Exhibit "F", letter Dyer to Doan, February 9, 1920 (Tr. 198).

It is impossible to reconcile the testimony of Mr. Berry with the uncontradicted evidence of Doan, corroborated and supported by the exhibits to which we have last referred. It is improbable that Doan would make any such statements at the time or after the time he had made these compromise arrangements with Dyer.

Mr. Jacob Berger testified that Doan said Dyer was interested in the Bull Bayou production (Tr. 84). F. E. Couch testified for appellee that at one conversation between July or August, 1919, Doan stated that he and Dyer were going to make a lot of money down there in Louisiana (Tr. 90). Mr. W. L. Leland, witness for appellee, gave like testimony (Tr. 93-4). Mr. Mestre Olcott, witness for appellee, testified that Doan had told him that he was going to take care of the Louisiana end of the business and Dyer the Texas end of the business (Tr. 99). Mr. E. J. Buckingham, witness for appellee, testified that in February, 1920, he asked Doan if Dyer and Doan were still partners and Doan replied:

> "Yes, we are still associated together; he is taking care of the Texas end and I am taking care of the Louisiana end" (Tr. 101).

According to the testimony of this witness this conversation was had after Dyer had agreed to repay Doan the moneys which Doan had advanced and it is difficult to reconcile this testimony with the undisputed evidence contained in the letters of Dyer and the testimony of both Dyer and Doan to which reference has been made.

Mr. L. E. H. DeSallier, witness for appellee, stated that in March or April, 1919, Doan stated he could not reach any decision and for him to see Dyer, his partner (Tr. 101). This did not relate to the Louisiana properties which had not been acquired by Doan at that time. This character of testimony is attempted to be supported by the testimony of Mr. A. T. Jergins, witness for appellee (Tr. 103-5). Doan having stated, according to this witness' testimony, that in connection with the deal in Comanche County he would have to take the matter up with Dyer who this witness claims Doan stated was his partner, this conversation having been had some time between April and July, 1919 (Tr. 103-5).

This testimony relates to a transaction wholly disassociated from the Louisiana venture. Doan denied that he had referred to Dyer as a "partner" and that he had never used this word in any business transaction and also denied that he had used this word in connection with his conversation with Mr. H. F. Berry. The testimony of Messrs. L. I. Coggins, and Joseph Martin with reference to a statement that they would see the names of Doan and Dyer on some tank cars is far fetched and cannot add weight to the claim which appellee endeavors to support by this character of testimony.

The authorities clearly hold that under the facts disclosed by the record in this case the parties were not partners.

Actual intention is necessary to constitute a partnership and it was held by the Supreme Court

of the State of California that there must be a joint understanding to share the profit and loss and that each party must by agreement in some way participate in the loss as well as the profits; and that where there was an agreement for a party under power of attorney to obtain patents in foreign countries, and in consideration for the services to share in one-half the profits, there was no partnership. As in the case at bar it was held that the essential elements of a partnership *inter se* are wanting and that there is no community in capital stock, profit or loss.

Wheeler v. Farmer, 38 Cal. 203, 213, 214, citing cases.

It has been held that

> "persons who share profits and losses are in my opinion properly called partners but that is a mere question of words. Their proportionate rights in any particular case must depend upon the real nature of the agreement into which they have entered".
>
> *Coward v. Clanton,* 122 Cal. 451, 454-5.

By referring to the agreement which Dyer testified was made between Doan and himself, as far as the Texas ventures were concerned (Tr. 109); and also to his testimony relating to the "agreement" concerning the Louisiana properties (Tr. 116-17), and leaving out of consideration for the purpose of the argument Doan's testimony denying these agreements, the rule announced in the case last cited is conclusive upon the question of partnership.

"As between the parties partnership is a matter of intention to be proved by their express agreement or inferred from their acts and conduct."

Morgart v. Smouse, 103 Md. 463; 7 Ann. Cas. 1140; 63 Atl. 1070; 115 Am. St. Rep. 367.

"A partnership is never created between parties by implication or operation of law, apart from an express or implied intention and agreement to constitute the relation. * * * Even where the parties agree to enter into a joint enterprise and share in the profits, a partnership, as between themselves, does not necessarily result. The intention of the parties always controls."

Reed v. Engel, 237 Ill. 628; 86 N. E. 1110, affirming 142 Ill. App. 413.

"Whenever in an action between two persons alleged to be partners, a partnership is sought to be proved, the decision of the question depends entirely upon the intention of the parties as legally ascertained. That does not mean a mere arbitrary intention. If the terms of the contract between the parties are fixed and certain, the question of partnership is usually a question of law to be decided upon the construction of the contract, and in such a case the declarations of the parties outside the contract as to the nature of the agreement which it was their intention to form would be of little weight. But unless in some manner it is found to be the intention of the parties that they should become partners, then the partnership cannot be said to exist."

Heye v. Tilford, 2 App. Div. 350; 37 N. Y. S. 751.

The case of *Lynden v. Spohn-Patrick Company,* 155 Cal. 177-180, supports appellant's contention that these "agreements" which Dyer claims Doan and he made did not constitute the parties partners as far as the Texas transactions were concerned. In the case cited, as in the case at bar, the party claiming a partnership,

> "was to have no title to any of the property and was not liable for any of the debts. His entire interest in the business consisted in his right to receive one-half of the profits as his compensation".
>
> *Reynolds v. Jackson,* 25 Cal. App. 490;
>
> *Jones v. Title Guaranty Co.,* 178 Cal. 375-378.

Where parties agreed that the profits of a certain business carried on by A and B were allowed to B for his services, it was held that there was no partnership but a mere participation in the profits as a remuneration to B for his services.

> "A mere participation in the profits will not make the parties partners *inter sese* whatever it will do as to third persons, unless they so intend it."
>
> *Haslett v. Harrison,* 1 Story, 371; Fed. cases No. 6279, Vol. 11.

> "Persons cannot be made to assume relation of partners as between themselves when their purpose is that no partnership shall exist."

There is no reason why they may not enter into an agreement whereby one of them shall participate in the profits arising from the management of particular property without his becoming a partner

with the others, or without his acquiring an interest in the property itself, so as to effect a change of title.

Insurance Co. v. Draner, 116 U. S. 461, 472.

The case of *Chapline v. Conant,* 3 W. Va. 507, is particularly apposite. In this case it was held that where there was a written agreement between the parties reciting that they were equally interested in option for sale of coal lands, which also gave plaintiff power of attorney from defendant to purchase land and conduct sale thereafter, providing all profits to be distributed equally between them, that it does not constitute them partners. Nothing agreed upon and fixed by terms of agreement except that plaintiff in absence of defendant is vested with power to accept options and make sale of property, and upon so doing profits were to be divided. This does not create partnership but only provides for doing certain things by plaintiff in the absence of defendant, in which one-half of profits go to plaintiff in the event of accomplishment.

When options were about to expire contracts were taken in name of defendant who became responsible for entire purchase price. No liability attached to plaintiff; no sum paid by him; and in no way did plaintiff become liable for payment of any part of purchase price. Property sold year later. Defendant told third parties that plaintiff and defendant were partners at time he fully believed Clark would share in profits.

The Court held:

> "If Clark (plaintiff) was a partner with Emory (defendant) why were contracts and options all taken in Emory's name? Why did Emory advance all the money, and become individually liable to the land owners? These facts are certainly not consistent with the plaintiff's claim, but speak most strongly against him."
>
> "To constitute a partnership between parties who share in profits, the interest in profits must be mutual. Each person must have a specific interest in them as a principal trader; he is not a partner merely because he receives a part of the profits as compensation for his services." (Citing cases.)
>
> "If persons merely occupy the relation of principal and agent, employer or employee or factor, no partnership can be predicated upon the fact that such agent, employee or factor receives a part or share of the profits for his services or other benefits conferred. * * *"
>
> "In every partnership there is a community of interest, but every community of interest does not create a partnership. There must be a joint ownership of the partnership funds, or a joint right of control over them and also an agreement to share the profits or losses arising therefrom."

See also *Clark v. Emory,* 58 W. Va. 637-642, 3, 4.

The facts in the case of *Stevens v. M'Kibbin,* 68 Fed. 407, 409-412, are very similar to the facts in the case at bar and the rule announced by the Court in the case cited should control and this Court should hold, as was held in the above case, that the

> "testimony wholly fails to establish an agreement and intention of the parties to create the partnership alleged in the bill"

for the reason that

> "two of the essential requisites of a partnership are wanting; a joint fund and a common risk * * *".

Appellee is not entitled to enforce any agreement between appellant and himself for the reason that there has been an entire failure of consideration.

According to the testimony of Dyer, Doan told him that Lucey had agreed that if Dyer would go up to Wichita Falls and organize and run the North Texas Supply Company that Lucey would go in with them on the Louisiana property and that there might possibly be a loss in the Louisiana venture but that the profits that might accrue from the North Texas Supply Company might overcome this loss. Dyer testified:

> "With a lump in my throat I said: 'Well, Larry, if that is a part of the game I will go out and do my best'" (Tr. 299).

Reference is also made to the testimony of Messrs. Doan (Tr. 187-190); Carr (Tr. 275-277), and Doan, Jr. (Tr. 283-286), which clearly indicates the terms of the agreement between Dyer, Lucey and Doan.

Appellee presented his case upon the theory that the claimed partnership relationship continued after the formation of the North Texas Supply Company and Doan became engaged in the Louisiana properties and that by the terms of this agreement

> "plaintiff and said defendant * * * and each of them should and would give their attendance and devote their entire time and attention to the business thereof (the partnership) and to the furtherance and advancement of the partnership business * * *" (Complaint paragraph 7, Tr. 3).

In the same paragraph it is alleged

> "that said plaintiff and said defendant should from time to time furnish to and for such copartnership such sums of money as should be necessary to promote and carry on its business and purposes * * *".

It already appears that Doan did devote his entire time and attention to the Louisiana development and advanced every dollar in these transactions. While it is contended by appellant that the contract between Captain Lucey, Doan and Dyer was as related in the testimony of Messrs. Doan, Couch and Doan, Jr., nevertheless upon appellee's own theory he is not entitled to an interest in any profits yielded from Louisiana operations for the reason that there is a total failure of consideration.

Dyer testified:

> "I never invested one cent individually in any of these projects of *Doane's* * * *" (Tr. 126).

It therefore must be conceded that Dyer failed to comply with the terms of the agreement in furnishing any part of the money necessary to promote and carry on the "partnership" business.

Further, the evidence shows that Dyer not only did not devote his "entire time and attention" to the business of the "partnership" but that he devoted practically his entire time and attention to his own projects and in traveling aimlessly about the United States from California to New York. The understanding had between Dyer, Lucey and Doan was to the effect that Dyer should go to Wichita Falls, remain there, manage the business of the North Texas Supply Company, form two rig building companies, drilling company, and devote the remainder of his time to projects in that vicinity (Doan, Tr. 189; Carr, Tr. 277, 280-282; Doan, Jr. 285).

L. E. Doan, Jr., testified that after the North Texas Supply Company was formed he accompanied Mr. Dyer to Wichita Falls, arriving there on June 23rd, but that Dyer did not remain there longer than two weeks. Dyer then went to Fort Worth for a short time and then to California where he remained about a month. Dyer made three separate trips to California before the first of the year and made at least three trips east during that period and that after two weeks Dyer was at Wichita Falls he was not there more than one day a week (Tr. 288).

This testimony is corroborated by the testimony of Mr. A. J. Carr who stated that he called Dyer a great many times long distance and sent telegrams to Dyer addressed to Wichita Falls, and that Dyer was absent and he would meet him at Fort

Worth on a great many occasions. Mr. Carr testified that Dyer was "a pretty live wire when he first started off" but that he slackened up in his efforts to make the business a success some time in the first part of October, 1919 (Tr. 280-81).

Dyer undertook to excuse his trips to California by saying that he went there to buy casing and tool joints. On cross-examination he testified that these articles were not manufactured in California (Tr. 315). It is unnecessary to detail the testimony to prove that Dyer did not fulfill his agreement and remain at Wichita Falls because he testified on cross-examination that all the letters and telegrams which appear in the transcript were received by him at the various points to which they were addressed, California, New York, Chattanooga, Chicago, Pittsburgh and the other points shown. He testified that he remained in California during the month of July for about three weeks, was in Los Angeles on Thanksgiving Day and Christmas and made three trips to New York from June 1st to the end of the year (Tr. 312-13).

During the time the so-called "partnership" was supposed to exist Dyer accepted employment with the American Oil Engineering Company at an initial salary of $1000 a month, which was subsequently increased to $1250 a month, and devoted a large portion of his time to the interests of that concern. Dyer testified that he first negotiated with the American Oil Engineering Company in New York the latter part of September or October, 1919, and

that he accepted employment with this concern in November or December of that year (Tr. 125).

He testified further that they paid him $1000 a month after October or November and that after the first of the year they began paying him $1250 a month (Tr. 128-9). In addition to this salary Dyer testified that American Oil Engineering Company agreed to give him bonus stock in that company which was being held in escrow at par, and that

> "they would carry me for a portion of that stock as one of their family, that the amount would have to be left until a later date, but they would see that I got a good block of it at par" (Tr. 167).

Dyer's testimony to the effect that he explained this transaction to Doan and that it was going to be to their joint interest was denied by Doan, who testified that Dyer told him that he was associated with the American Oil Engineering Company on January 21, 1920 (Tr. 191). Whatever the fact may be it nevertheless appears that Dyer did make arrangements to enter the employment of the American Oil Engineering Company at the salary testified by him and that he was to receive bonus stock in that company as "one of their family"; and it is inconceivable that a firm would pay an employee this large salary and carry him for bonus stock as one of "their family" unless they could command the entire time and attention of their employee. This fact does not match well with the allegations in the complaint that the parties were

to devote their time and attention to the "partnership" affairs, the partnership under the decree having terminated March 22, 1920.

Dyer testified that in the fall of 1919 he went to Fort Worth and established an office for the American Oil Engineering Company, put Mr. Spoonts in charge as their representative, and that he was instrumental in having Mr. Spoonts go there and helped to open the office, and he further stated that "I oversaw it" (Tr. 165). He further testified that he had something to do with the work of drilling a well for the American Oil Engineering Company in the fall of 1919. Dyer evidently became a trusted employee of the American Oil Engineering Company at the time the arrangement was made with that firm because, according to his own testimony, he had established an office for them and was overseeing their business at Fort Worth, made trips to New York himself for them, superintended the work of drilling their well at Wichita Falls (Tr. 166), and that he purchased a pipe line for the American Oil Engineering Company; and it is interesting to note in this particular that while Dyer was manager of the North Texas Supply Company he turned the profit which would accrue to that corporation over to the American Oil Engineering Company.

The American Oil Engineering Company evidently had furnished Dyer with their stationery because the letter addressed by Dyer to Doan from Fort Worth, January 21, 1920, was written on the

stationery of the American Oil Engineering Company (Defendant's Exhibit "C", Tr. 195), and he again used this stationery in writing to Doan under date of January 26 (Defendant's Exhibit "E", Tr. 197) and again under date of February 9, 1920, Dyer wrote to Doan on the stationery of the American Oil Engineering Company and stated:

> "*I* have just completed the purchase of a dandy lease in Stephens County for my New York friends * * *" (Defendant's Exhibit "F", Tr. 198-9).

This was all prior to the time the so-called partnership had been terminated, the date fixed by the Court being March 22, 1920.

Dyer testified that in November, 1919, he told Captain Lucey that he had made arrangements to do some work for the American Oil Engineering Company and wanted to know how soon Captain Lucey was going to take over the North Texas Supply Company because after the first of the year he could not give them very much of his time (Tr. 301.) There has never been a claim advanced by Dyer that the services which he was to render to the American Oil Engineering Company were within the scope of any partnership agreement and this and other testimony relating to the American Oil Engineering Company is conclusive upon the fact that no partnership existed and that Dyer without the consent of Doan, even without his knowledge, negotiated with this concern to enter their employ on his

own account and in furtherance of his own independent interests.

Dyer's last version of his negotiations and relations with the American Oil Engineering Company are set forth in his testimony appearing at Tr. 314:

> "The first talk I had with reference to my entering the employ of the American Oil Company was about the first of October. I went to New York and met Mr. Seton, Mr. Porter and Mr. Meredith. We reached no conclusion at that time. I first agreed with them to render services in the latter part of the year. I think it was in November that I encouraged them and settled it in December, when I went there for a meeting. The January check I received was for December services. At our first meeting they spoke of bonus stock. I was to be given that after it had been earned. I got it at par and it was held in escrow."

In the light of this testimony it cannot justly be held that the appellee fulfilled the agreement he had made with Messrs. Lucey and Doan, nor that he measured up to the agreement which he swore in his complaint the parties had made, that they should devote their entire time and attention to the business of the "partnership" affairs. The testimony of appellee himself shows that he absented himself from the place where he should have been engaged and made several trips to California and New York on his own personal account, and made a separate and independent arrangement to enter the employment of the American Oil Engineering Company, established offices for them at Fort Worth, undertook to oversee their busi-

ness, made several trips to purchase a long pipe line for them and superintended the construction of their drilling operations as "one of their family". All during the time it appears from the uncontradicted evidence Doan was devoting his entire time and attention to his Louisiana venture. The fact that Doan, according to the testimony of Mr. Titus and himself (Tr. 203, 187) refused to permit Dyer to go to Louisiana and participate in the control, management or development of the properties which Doan, Titus and Lucey had acquired cannot excuse Dyer for not having carried out the agreement to conduct the business of the North Texas Supply Company and earn the bonus stock which had been promised him by Captain Lucey provided a profit of $100,000 had been made at the end of 12 months, especially in view of the testimony of Mr. Carr that the trade and business conditions and the supply business during the year 1919 at Wichita Falls were the best of any district he had ever known; the rig-building business was excellent; in fact all oil well business was excellent

If there had been a partnership Dyer would have had a vested interest in the partnership business but it cannot be held under the evidence that he had such an interest, nor can it be shown as far as the Louisiana operations were concerned that it was a joint venture. Under no possible theory can Dyer claim that he had more than a contingent interest in Doan's Louisiana activities dependent upon his success in managing the North Texas Supply Company and the kindred operations at

Wichita Falls. Even though the parties had been engaged in the joint venture Dyer would not be entitled to recover because he did not fulfill his provisions of the agreement but failed entirely to carry out the provisions of any agreement which may have been entered into between the parties by his failure to properly manage the business of the North Texas Supply Company, form the subsidiary companies and by accepting employment with the American Oil Engineering Company. There was an entire failure of consideration. It conclusively appears from the account rendered by Dyer (Tr. 384) that Doan did not profit to the extent of a single dollar in any of Dyer's activities during the time Doan was engaged in developing the Louisiana holdings, and it must be held that his claim is unfounded.

It is respectfully submitted that the Court should hold, as it was held in the case of *Mitchell v. Oneal,* 4 Nev. 926, that

> "upon the showing thus made by plaintiff himself the contract or agreement was entirely without mutuality, founded upon no consideration, and hence entirely void".

It is submitted that the interlocutory decree should be set aside and that this Court should direct that a final decree be entered declaring that no partnership existed between the parties at any time; that there was a total failure of consideration supporting on behalf of appellee any agreement or agreements which he at any time made with appellant; and that appellee is not entitled to an

accounting or to receive any sum whatever from appellant.

To affirm the interlocutory decree would establish a precedent which would make it unsafe for any person to maintain the most casual business relations with others, in which such others had a contingent interest, without fear that the parties having such contingent interest might, in the event the venture proved a success, claim the rights accruing to a partner and, in the event of failure, disclaiming any such relationship.

ACCOUNTING.

In the event this Court concludes that the interlocutory decree entered in the trial Court should be reversed, it will, of course, be unnecessary for the Court to consider the questions relating to accounting.

In arguing the assignment of errors relating to the accounting between the parties we will, of course, proceed upon the assumption that the parties to the controversy were partners without in any way conceding the correctness of the interlocutory decree establishing this relationship.

By stipulation between the parties all evidence introduced before the Court in the main case was incorporated in the record of the proceedings before the Master.

Appellant's argument relating to the accounting between the parties will deal only with Exceptions Nos. 26 to 34, inclusive (Tr. 416-424) which concern the right of the appellee to any portion of the second issue of stock of the Doan Oil Company which Doan in his discretion did not purchase.

In this particular the Master concluded that none of this stock constituted an asset of the partnership, the Court, however, disapproving this portion of the Master's report.

The argument will also relate to Exception No. 39 (Tr. 426-7) in which it is contended that the Court erred in overruling defendant's exceptions to the Special Master's report in refusing to allow defendant interest upon all moneys advanced by him as set forth in defendant's amended account.

APPELLEE HAD NO INTEREST IN THE SECOND ISSUE OF THE STOCK OF THE DOAN OIL COMPANY AND APPELLANT IS NOT OBLIGED TO ACCOUNT THEREFOR.

The facts relating to the authorization, apportionment, issuance and sale of this stock are undisputed and are set forth clearly in the report of the Master (Tr. 34-39).

The manner in which this stock which had been allotted to Doan was sold and disposed of is set forth in the testimony of Doan (Tr. 348, 349, 350, 354, 355, 356, 358, 359); and the testimony of Mr. Claude Gatch (Tr. 361, 364); Mr. W. B. Morris (Tr. 365,

366, 367); Mr. C. E. Doan (Tr. 376-380); and Mr. L. E. Doan, Jr., (Tr. 381-383).

At the time the Doan Oil Company was organized stock of a par value of $300,000 was issued, of which Doan acquired one-third, and for which he paid $100,000 from his own funds. By a resolution adopted by the Board of Directors of Doan Oil Company on November 10, 1919, the company offered 100,000 additional shares of its capital stock for sale at par, payable one-half on or before December 15, 1919, and one-half on or before January, 1920 (Tr. 34). Stock was offered to the stockholders as follows:

50,000 shares to Louis Titus;
33,333 shares to L. E. Doan; and
16,667 shares to Captain J. F. Lucey,

the stock being apportioned in ratio to the interests of the stockholders in the corporation. The resolution provided that if the stockholders named failed to subscribe and pay for all or any portion of their allowance, the stock should be subjected to such further action as the board might decide.

Appellee claims that he *individually* should have been accorded the right to acquire one-half of the amount of stock allotted to appellant.

It is contended by appellant that the claim of the appellee should be disallowed for the reasons:

That the right to acquire this stock was a partnership asset and that appellee had no individual right thereto;

That appellant as an active "partner", in exclusive control and management of the "partnership" business, had a right to exercise his discretion in not acquiring this stock.

That there were no partnership funds with which to acquire this stock and there was no obligation upon appellant to advance funds to acquire all or a portion of this stock;

That appellant had no funds of his own with which to acquire this stock;

That appellee had no funds of his own with which to acquire this stock for himself individually or for the partnership;

That appellee had no right to individually subscribe for this stock;

That appellee could not have profited by the acquisition of this stock for the reason that he would have been obliged to surrender one-fourth of it in order to obtain the money to pay for the stock;

That the portion of this stock issued to Messrs. Gatch and Morris was in satisfaction of a partnership obligation and that therefore neither the partnership nor the parties individually could have acquired this portion of the stock;

That the transaction relating to the issuance of a portion of this stock to Doan's son was consummated subsequent to the termination of the "partnership";

That title to the stock passed absolutely to the persons acquiring it and that they paid for it with their own funds.

If in fact the parties bore the relationship of partners, as was found by the interlocutory decree, at the time this second issue of stock was offered it follows as a matter of law that the option could only be exercised by the partnership for and on behalf of the partnership and not for the benefit of either of the partners individually. Either one of the parties, in this case the active managing partner, could, as was held by the Master, exercise a discretion binding upon the partnership to take advantage of the offer to acquire additional stock, or on behalf of the partnership to nominate others as provided by the resolution of the Board of Directors of Doan Oil Company.

The fact that Doan, who was in exclusive charge of the business, who had advanced *all* of the capital, who had done *all* of the work, exercised a discretion in not acquiring this stock for the partnership does not entitle appellee to recover one-half of the amount of stock for which appellant might have subscribed.

It was found by the Master that

> "in any event it must be remembered that the terms of the partnership implied a discretion in Doan as to how much of his money he should invest. He certainly could not be compelled to borrow or even invest funds of his own if he did not deem it wise" (Tr. 36).

This finding of the Master is fully supported by the evidence of appellee and his witnesses to the effect that Doan "was to take care of the Louisiana end and Dyer was to take care of the Texas end".

Doan testified that he would not permit Dyer to go to Louisiana, this testimony being corroborated by Mr. Louis Titus, and there is not a syllable of testimony to the effect that Dyer ever undertook to exercise any judgment with reference to the acquisition and development or sale of any of the Louisiana properties, nor is there any evidence to show that he protested against Doan's refusal to permit him to go to Louisiana; in fact he testified that the only information he had about Louisiana was such as had been given him by Doan (Tr. 122-3).

Doan's testimony to the effect that he did not have any money with which to purchase any additional stock stands uncontradicted in the evidence and there being no testimony to the effect that Dyer ever claimed any right to participate in the management of the Louisiana properties, it must be held, as was found by the Master, that Doan could exercise a discretion on behalf of the "partnership" in not acquiring this stock.

If the parties were in fact "partners" either one of the "partners", and especially the "partner" who had advanced the entire capital of $100,000 out of his own funds, and who without any protest or objection from his "partner" had the exclusive charge and management of the "partnership" business could exercise a discretion on behalf of the "partnership" of subscribing and paying or declining to subscribe and pay for the "partnership" allotment, and in the event there were no partner-

ship funds,—and this is the fact because there never were any with which to acquire this stock,—had a right to bind the partnership by nominating the persons who might avail themselves of this right.

Doan testified that there was no existing account of Doan & Dyer or Dyer & Doan at the time the second issue of stock was made in November, 1919, and never was any such account; that he did not have any funds belonging to Dyer at that time, but on the contrary Dyer owed him money which Doan was endeavoring to obtain from Dyer. It was about this time, according to the testimony of Doan, that he requested Dyer to repay him $6000 on account of the Doan Syndicate. Dyer agreed to pay this money but paid only $3000 of it to Doan. Dyer also held the money that had accrued under the last sale of the Oklahoma lease.

There is no evidence to show that Doan ever agreed to purchase any particular properties or any specified amount of stock in Doan Oil Company or any other concern. Dyer had no money of his own and his testimony was to the effect that his borrowing capacity was limited to $50,000. Doan testified that he had borrowed some of the money which was invested in Doan Oil Company. He could not be compelled against his will and was under no duty to borrow further additional sums to invest for the benefit of a then "silent partner".

Dyer had much to say in his testimony with reference to his ability to purchase some of this addi-

tional stock but there is not one syllable of evidence to the effect that he ever made an offer to advance any sum to Doan to supply any capital for the partnership.

By reviewing the testimony of Dyer it will be found that it relates exclusively to an alleged offer made to *Doan* to pay *Doan* $50,000 for one-half of the stock of Doan Oil Company which Doan held in his name, according to the theory of plaintiff's case, under an agreement of partnership. If Dyer had this money to invest it was his duty, if the claimed relation existed, to advance this $50,000 as capital to be used by the partnership. In Dyer's amended verified complaint it is alleged that both Doan and himself should from time to time furnish to and for the partnership such sums of money as should be necessary to promote and carry on its business. His interest in the partnership would then have been equalized. But, according to his testimony, he was purchasing the stock for his own personal account either from Doan Oil Company or from Doan. In his letter of January 21, 1920, addressed to Doan, Dyer advised that in order to raise the $50,000 which he desired to pay Doan for one-half of the stock held by Doan, and in order that title to this stock might vest in Dyer, he would be obliged to give one-fourth of it to Mr. Herbert Fleishhacker with whom he claims to have made an arrangement to borrow this $50,000, although Mr. Fleishhacker has no recollection of having committed himself in this particular.

The sum and substance of plaintiff's testimony relating to this transaction is that he was giving up one-fourth of 50% of the stock of the Doan Oil Company standing in the name of Doan in order to acquire a three-eighths undivided interest *for himself*. It cannot be held that the offer was made either on behalf of the partnership or that Dyer was offering to do this in order to equalize the partnership interests. The evidence shows conclusively throughout the transaction Dyer was dealing with Doan individually as the owner of the stock and did not intend in any sense that the amount of $50,000 should be applied to the capital account of the partnership.

In view of appellee's own testimony, especially when read in the light of surrounding circumstances,—giving consideration also to the fact that plaintiff was unable to obtain the $10,000 necessary to fulfill the agreement admitted by him to pay for and acquire the stock of the North Texas Supply Company of this value, it must be held that in the first instance Doan was under no obligation to acquire any portion of this additional stock for Dyer and incidentally for the partnership; that Dyer was wholly unable to acquire any of the stock even though he had been invited to do so; that the plaintiff has never been at any time entitled to any portion of this stock; and that defendant could not be held accountable therefor.

The testimony of Dyer and his witnesses is also conclusive upon the fact found by the Master that

> "In any event, it is not evident from the evidence that Dyer would or could have subscribed to this extra stock and so he is not proved to have been harmed by Doan's nondisclosure. He apparently had no considerable funds of his own and his credit is limited by the proofs to $50,000.00. It is therefore not apparent that Dyer could have taken the extra 16,666 shares any easier than Doan could have done so" (Tr. 35).

The testimony of Dyer is to the effect that he was desirous of acquiring one-half of the allotment which had been made to Doan. Dyer would have been obliged, according to his testimony, even though he could have arranged for a loan of the necessary amount to pay for this stock, to give up a quarter of it as he was obliged to do in borrowing the $50,000 which he expected to pay to Doan *individually* for 50% interest in the stock originally issued to Doan, and would not therefore have profited by the transaction. Dyer testified that he had no money with which to purchase any stock whatsoever. He testified in the proceedings before the Master that he did not purchase the stock for which he had subscribed in the North Texas Supply Company because he could not do so, and that he subsequently got Messrs. Couch and Owens, friends of his, to purchase this stock for him (Tr. 386). Dyer further testified that he asked to purchase one-half of "his (Doan's) holdings" and that he was going to borrow the money to purchase and was to give Mr. Herbert Fleishhacker one-quarter of the $50,000 of stock if he had to get it (Tr. 387-8).

The salary which Dyer had received from the North Texas Supply Company and the American Oil Engineering Company was, according to the testimony of Dyer, "dissipated" by him (Tr. 390). If the allegation contained in Dyer's complaint to the effect that the parties were to "furnish to and for such copartnership such sums of money as should be necessary to promote and carry on its business" (Complaint paragraph 7, Tr. 3) it was his duty, if he had the $50,000 available or any other sum, to invest this in the partnership in order that the interests of Doan and himself might be equalized. However, he at no time made an offer to pay this or any other sum into any partnership fund but all his testimony relates to an effort he made to pay Doan $50,000 for *his* interest in the Doan Oil Company. He was desirous of acquiring this stock for his own personal account. Throughout Dyer's testimony he has contended consistently that he was entitled to acquire an individual interest in the stock of the Doan Oil Company. His counsel has presented his case upon this theory and it is respectfully submitted that the erroneous assumption made by appellee, his counsel, and the Court, that Dyer was individually entitled to subscribe to any portion of the allotment made to Doan individually or to the partnership, can not be supported by the facts or the law.

The undisputed testimony shows, as far as Doan is concerned, that he did not have any money to pay for additional stock and that of the amount

of stock allotted to him 5000 shares were issued to Morris, 5000 shares were issued to his brother, 5000 to his sisters, 5000 to his nephew, and a portion of his allotment, together with some of the stock which had been allotted to Lucey and Titus, amounting in all to 10,000 shares, was issued to S. S. Raymond, geologist in the employ of the Doan Oil Company (Tr. 340, 348). The evidence of Doan is supported by vouchers which he introduced in evidence, also by the testimony of his brother (Tr. 376-380) and Messrs. Morris & Gatch (Tr. 361-368), and proves conclusively that the stock issued to R. E. Doan, Hattie E. Doan, Mary Elizabeth Doan, C. E. Doan, S. S. Raymond, and to Messrs. Gatch & Morris, was paid for by moneys advanced by these parties, at par, and that Doan did not advance any of the money for any of the stock and had no understanding from any of the parties named that he was to receive any of this stock and that the stock was bought and paid for by the parties to whom it was issued.

The Master found that

> "the evidence is very plain that each of these persons (to whom Doan's allotment of stock was issued) paid for the stock with his or her own money and that there was and is no agreement for resale to Doan" (Tr. 37).

It is respectfully submitted that the trial Court erred in sustaining plaintiff's second exception and in overruling this part of the Master's report; and that the Court fell into error, as appears from

memorandum opinion (Tr. 66, et seq.), in holding that Dyer had an *individual* right to subscribe for this stock, when as a matter of fact if the parties were partners the partnership could alone exercise this right.

It is therefore respectfully submitted that appellant's exceptions should be allowed and the final decree modified to conform to the findings and report of the Master.

In the Master's report, page 41, et seq., there is set forth the transaction between Doan Oil Company, L. E. Doan and Louis Titus and the General Petroleum Company, whereby the Doan Oil Company gave the General Petroleum Company an option to purchase certain properties, consideration for the option being $50,000 paid to Doan and Titus and the issuance to them of stock of the General Petroleum Company of an agreed value of $200,000. The money and stock received as consideration for the option was applied proportionately to the interests of the stockholders at that time, including those who had acquired the original issue and second issue of the stock of the Doan Oil Company.

In this connection we direct the Court's attention to the fact that while appellee contends that appellant prejudiced his interests and mismanaged the affairs of the partnership, and generally wronged appellee in not subscribing for the second issue of stock of Doan Oil Company, that when appellant exercised his discretion in extending an option to the General Petroleum Company for the entire

stock standing in appellant's name, of a par value of $100,000, and which resulted in a profit, that no such question of authority or abuse of discretion was raised.

In the Master's report he held that the second issue of $100,000 of the Doan Oil Company, of which 33,333 shares were apportioned to Doan, was not an asset of the partnership and that Doan need not account to Dyer for this amount. The Master further held that Doan should account to Dyer for one-half of the $12,500 and one-half of the 248 shares of the General Petroleum Company stock which accrued to Doan under his proportional interest in the Doan Oil Company at the time this money and stock was apportioned among the stockholders (Tr. 46).

The finding of the Master with respect to the 33,333 shares was reversed and it was held by the Court that this stock became a partnership asset. The decree further provides (Tr. 75) that plaintiff is entitled to his pro rata thereof, to wit, one-sixth, represented by $8333.33 and 166⅔ shares of the General Petroleum Company, and that plaintiff is entitled to credit for all dividends paid by General Petroleum Company since April 16, 1920.

In the event this Court sustains the Master's findings and conclusions and reverses the decree entered by the trial Court relative to the 33,333 shares of stock of the Doan Oil Company Dyer would only be entitled to receive one-half of the $12,500 received by Doan, together with interest;

one-half of the proceeds of the sale of 2 shares made by Doan to Titus, with interest; and one-half of the 248 shares of the General Petroleum Company held by Doan, as found by the Master, instead of the amount of money and stock awarded to Dyer by the decree of the Court.

Appellant is entitled to interest upon the moneys advanced by him on behalf of appellee from the date of advancement to date.

In the amended account submitted by Doan in response to the requirements of the interlocutory decree an interest charge is made on moneys advanced by Doan, aggregating $9149.30 (Tr. 328, et seq.), the interest being computed for a term represented by the time the moneys were paid by Doan until the date of the account. By this account it is shown that Dyer owed Doan the sum of $33,345.72 (Tr. 330, et seq.).

The account submitted by Dyer shows that the balance claimed by Dyer on the moneys handled by him from the entire "partnership" from August, 1918, until the date of dissolution decreed by the Court is $602.32 (Tr. 384-5).

At the hearing before the Master appellee's counsel did not question the allowance of interest but contended that a proper method of computing this interest would be to compute it by determining from day to day during the acquisition of the Doan Oil Company stock the balance of Doan's own money shown to have been invested therein (Master's report, Tr. 48).

The Master, however, held that in the absence of an agreement interest should not be charged on the advances of partners to firm capital or on the balance to a partner's credit and finding that there was no such agreement held that Dyer should only be obliged to pay to Doan interest due Doan from Dyer from the date of the dissolution, aggregating $5471.80 (Master's report, Tr. 5-55). Doan, however, is charged with interest on one-half of the dividends accruing on Doan Oil Company stock and interest on one-half of the cash received from the General Petroleum Corporation; interest on one-half of the amount which Dyer advanced in purchasing an automobile, aggregating $130.11; and interest on one-half of the amount advanced by Dyer to Couch on the previous deals (Tr. 54). Appellant is unable to understand why he should be required to pay Dyer interest on the comparatively small sums advanced by Dyer on the Texas deals and be denied the right to recover interest from Dyer for amounts which Doan advanced on the Louisiana deals. There can be no difference in principle.

The Master fortifies his ruling by the citation of several authorities which it is respectfully submitted are not controlling, under the facts in the case at bar. It is true as found by the Master, that there was no express agreement between the parties to pay interest on advances made by either of them to the partnership. In fact it is appellant's contention that there was no agreement at

all. It is alleged in plaintiff's verified amended complaint that

> "said plaintiff and said defendant should from time to time furnish to and for such copartnership such sums of money as should be necessary to promote and carry on its business" (Paragraph 7, Tr. 3).

The amended complaint was filed on the last day of the hearing after the evidence had been closed and at a time when both appellee and his counsel were fully advised as to the facts and appellee cannot now contend that there was any other agreement between the parties.

The uncontradicted evidence shows that Doan advanced every dollar that was invested in the Louisiana properties both prior and subsequent to the organization of the Doan Oil Company. Dyer testified:

> "I never invested one cent individually in one of these projects of Doan's" (Tr. 126).

Dyer's account also shows this to be the fact (Tr. 384).

There is no evidence to the effect that Doan was to provide the entire capital for the partnership and in the absence of any such evidence the allegations contained in plaintiff's complaint must be accepted.

The general rule announced by the Master to the effect that in the absence of an agreement interest should be charged on advances made by the

partner to the *firm capital,* or on balance to a partner's credit no such interest will be allowed, may be conceded. But the facts of this case take it out of the general rule and therefore the authorities cited by the Master are not controlling.

In the case of *Tirrell v. Jones,* 39 Cal. 655, the agreement was that one of the parties should advance all the necessary funds in the execution of the venture and the other party should render his services, skill and experience, for which they respectively were to receive an equal division of the profits. In the case at bar the facts, according to the allegations contained in the complaint, are that the parties "should from time to time furnish to and for such copartnership such sums of money as should be necessary to promote and carry on its business".

The evidence further hows that not only did Dyer fail to contribute any sum whatsoever to the "copartnership" but that during the time Doan was engaged in the Louisiana activities Dyer withheld $2090 (the same item set forth in his account), which he stated he was withholding "subject to our settlement" (Tr. 164). In the case under analysis it was expressly provided that one of the parties should advance all of the necessary funds and the other should render services, skill and experience. The uncontradicted evidence in the case at bar shows that not only did Dyer fail to furnish any sums to the copartnership but that

he never participated in any way in the Louisiana activities. Dyer testified:

> "I never invested any money in Louisiana in any property in which Doan was interested, except through Doan. I never invested one cent individually in any of these projects of Doan's" (Tr. 126).

The next case cited by the Master, *Falkner v. Hendy,* 80 Cal. 636; 103 Cal. 26, likewise related to a partnership in which the defendant was to furnish the entire capital and plaintiff his experience and time, and there was an express agreement that the defendant should be entitled to interest of 1½ per cent per month upon all of the advances made by him on account of the joint enterprise. The Court merely held in deciding this case that upon the termination of contractual arrangements the legal rate of interest was chargeable against plaintiff and not the rate of interest which was provided for by the agreement to be paid during the continuance of the relationship.

In the case of *Carpenter v. Hathaway*, 87 Cal. 434, also cited by the Master, the agreement contemplated that one of the partners should furnish the entire capital and the other render services in furtherance of the joint venture and it was held that the partner furnishing the capital was not entitled to interest thereon. The case is essentially different from the case at bar in which, according to the sworn complaint of the plaintiff, the parties were both to devote their entire time to the business of the partnership and furnish such moneys

to the partnership as were necessary to conduct the business.

Young v. Canfield, 33 Cal. App. 343, was likewise a case where one of the partners was to furnish the capital and the other all the work in connection with the venture. It was held that the person furnishing the capital could not recover interest unless there was an express agreement to that effect.

In the case at bar the $100,000 subscribed by Doan to the stock of the Doan Oil Company was not a contribution to firm capital but $50,000 of this amount was in the nature of a personal loan to Dyer. By referring to Defendant's Exhibits "C" and "E" it is impossible to escape the conclusion that Dyer so regarded the transaction. He was, as already pointed out, offering to repay to Doan $50,000 for a one-half interest in the Doan Oil Company stock. He was not offering to pay this amount into the treasury of the partnership but he was offering to pay this money to Doan individually, thereby recognizing that he was obligated personally to Doan for the $50,000 which represented one-half of the amount advanced by Doan to purchase the stock of the Doan Oil Company.

Appellant's demand that appellee pay interest on this $50,000 is not an attempt to charge the firm with this payment but is a request to have this amount accruing by way of interest applied as an addition to what is due from Doan to Dyer. It

is in the nature of interest on a personal debt from Dyer to Doan.

As far as the transaction relating to the Doan Oil Company stock was concerned the "partnership" under the decision of the Court had invested $100,000, representing the entire partnership capital. Plaintiff has sworn that the agreement between the parties required that they should furnish to the partnership from time to time such "sums of money as should be necessary to promote and carry on its business". It is not disputed that this money was necessary to carry on its business. The interests of the parties under the decision of the Court were equal and if this be so each should have contributed to the partnership capital an equal amount, or $50,000 each. Under the decree of the Court it must be held that Doan actually paid this amount into the Doan Oil Company from the funds of the "partnership". Dyer became obligated to Doan personally for 50% of this amount. The partnership as such was not interested in the relations between the parties themselves. This $50,000 was not a debt from Dyer to the partnership but was a debt from Dyer to Doan. And this is true as shown by Defendant's Exhibits "C" and "E".

This is an equitable proceeding and it would do violence to the equitable principles which govern in such cases for this Court to affirm a decree which denies one who has advanced the entire capital; assumed the entire risk; and devoted his entire time, in an undertaking in which the other has never

contributed a cent; assumed no risk; and devoted no attention, the right to recover interest accruing upon one-half of the amount advanced, according to the decree, for the other party.

It is respectfully submitted that the interlocutory and final decree should be reversed and suitable order entered dismissing the proceedings.

Dated, San Francisco,
October 9, 1922.

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Attorneys for Appellant.